OLGOONIK CORPORATION, INC.

IBLA 85-586 Decided December 29, 1986

Appeal from a decision of the Alaska State Office, Bureau of Land Management, rejecting Native village corporation selection application in part. F-14954-A and F-80861.

Affirmed.

1. Alaska Native Claims Settlement Act: Definitions: Public Lands -- Alaska Native Claims Settlement Act: Native Land Selections: Village Selections

The smallest practicable tract of land occupied and actually used by the Bureau of Indian Affairs as a school during the period of time it was available for selection by a Native village corporation does not come within the definition of "public lands" under sec. 3(e) of the Alaska Native Claims Settlement Act, as amended, 43 U.S.C. § 1602(e) (1982), and thus is not available for Native village selection even though the Bureau entered into an agreement during the selection period to transfer use of the land to a State agency.

APPEARANCES: James E. Hutchins, Esq., Anchorage, Alaska, for appellant; Roger L. Hudson, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Anchorage, Alaska, for the Bureau of Land Management.

OPINION BY CHIEF ADMINISTRATIVE JUDGE HORTON

Olgoonik Corporation, Inc., a Native village corporation, has appealed from a decision of the Alaska State Office, Bureau of Land Management (BLM), dated March 27, 1985, rejecting in part its selection application, F-14954-A, filed on behalf of the Native village of Wainwright pursuant to section 12(a)(1) of the Alaska Native Claims Settlement Act (ANCSA), as amended, 43 U.S.C. § 1611(a)(1) (1982).

On November 15, 1973, appellant filed a selection application for the surface estate in 109,741 acres of land, including the land situated in sec. 24, T. 15 N., R. 32 W., Umiat Meridian, Alaska, which had been reserved "pending survey" pursuant to Executive Order, dated May 4, 1907, "for educational purposes." On April 5, 1939, a survey of the Wainwright school reserve (U.S. Survey No. 2401), which encompasses 1.80 acres of land, was accepted by

the General Land Office, the predecessor of BLM. This reserve constitutes a small portion of the 40 acres of land originally reserved by the May 4, 1907, Executive Order.

Section 12(a)(1) of ANCSA, 43 U.S.C. § 1611(a)(1) (1982), provides for the selection by a Native village corporation of land withdrawn by section 11(a) of ANCSA, 43 U.S.C. § 1610(a) (1982), which had withdrawn in part certain "public lands" in core and surrounding townships of enumerated Native villages, including the Native village of Wainwright, Arctic Slope. However, the term "public lands" is defined in section 3(e) of ANCSA, as amended, 43 U.S.C. § 1602(e) (1982), in relevant part, as "all Federal lands and interests therein located in Alaska except: 1) the smallest practicable tract, as determined by the Secretary, enclosing land actually used in connection with the administration of any Federal installation." (Emphasis added.) That land which is excepted from the definition of "public lands" is excluded from withdrawal and selection by the Native village corporation and is subject to retention in Federal ownership. The question thus arises whether the Wainwright school reserve is excepted from the definition of "public lands."

In October 1974, the Area Director, Juneau Area Office, Bureau of Indian Affairs (BIA), entered into a Memorandum of Agreement with the Superintendent, North Slope Borough School District (NSBSD), regarding the Wainwright school reserve. In that agreement, BIA agreed in part to "place on use permit to NSBSD all bureau facilities and personnel property at Wainwright" and NSBSD agreed to "[a]ccept total responsibility for the educational program, personnel and school facilities at Wainwright" and to "operate the Title I program under contract with the [BIA]." In a Tribal Decision Report, dated October 10, 1974, prior to the Memorandum of Agreement, BIA had stated that the "[t]arget date for school turnover is November 30, 1974."

By memorandum dated March 18, 1976, the Acting Realty Officer, Fairbanks Agency, BIA, informed the Area Realty Officer, Juneau Area Office, BIA, that, with respect to various BIA school sites, including the site in Wainwright: "We have no interest in these lots, these are not Federal installations." In a letter dated September 9, 1976, which accompanied a deed for the Wainwright school reserve, the Acting Area Director, Juneau Area Office, BIA, informed the Mayor, North Slope Borough (NSB), that effective on the date BIA signed the deed "you will be the owner of the property as we will have conveyed to you our entire right, title, and interest in the properties." The Mayor, NSB, responded in a letter, dated November 17, 1976, that NSB would require as a condition of acceptance of the transfer of the Wainwright school reserve that BIA provide funding to ensure compliance with State safety codes. By letter dated December 8, 1976, the Area Director informed the Mayor that BIA would not provide the necessary funds and concluded:

> In summary, then, I cannot comply with your wishes but likewise want in no way to force Bureau schools onto the Borough. I will understand if you elect not to take them. And if that is the case, since we have no money to maintain them, will declare them surplus to Bureau needs, and turn them over to Government

> Services Administration (GSA) for their standard disposal action. By letter dated July 27, 1977, the Area Director informed the Mayor that unless BIA was notified of NSB's acceptance of the school site by close of business August 19, 1977, it would begin to turn the site over to GSA for disposal.

By memorandum dated November 27, 1978, the Area Director notified the State Director, BLM, that various school reserves, including the Wainwright school reserve, "are not necessary for the current operation of a Federal installation." The Area Director stated that BIA could not justify retaining the lands in these reserves under section 3(e) of ANCSA. The Area Director requested that BLM accept these lands "for transfer to the Native village corporations under the ANCSA." In a February 22, 1979, memorandum to the State Director, the Area Director reiterated that BIA "no longer [has] a need" for the school site. In a report dated November 30, 1979, the Area Director reported the Wainwright school reserve to GSA as excess real property.

By notice dated March 24, 1983, BLM required BIA to provide certain information necessary to determine whether the Wainwright school reserve, given serial number F-80861, was included in the definition of "public lands" under section 3(e) of ANCSA. BLM required BIA to justify retention of the school site in Federal ownership. BLM asked BIA in part what use was being made of the land "as of December 18, 1971," and whether any action had taken place "between December 18, 1971, and December 18, 1974," which would reduce the area needed. BLM stated that BIA was required to furnish the information within 90 days from receipt of the notice. The record indicates that BIA received the notice on March 28, 1983. The deadline for filing the required information was, thus, June 27, 1983. By letter dated July 18, 1983, pursuant to a June 6, 1983, request, BLM extended the deadline for filing to August 29, 1983. In an August 31, 1983, letter, BLM informed BIA that it could request an extension of time prior to August 29, 1983, or "we will proceed with the determination action for this site using information available in the case file."

On November 14, 1983, BIA responded to BLM's original March 1983 notice, stating that BIA had operated the school continuously during the selection period from December 18, 1971, through December 18, 1974, and that NSB had administered the education programs of the BIA Wainwright school since July 5, 1975. BIA described the facilities at the school site as follows:

> On-site improvements consist of a shop building containing 756 square feet built in 1933, a warehouse with 432 square feet constructed in 1939. There is a house with 308 square feet built in 1941, with a warehouse containing 280 square feet built in the same year. A building with four classrooms and two living quarters contains 8,880 square feet; which was originally built in 1963, with additions made in 1971 and 1974. In 1963, a diesel powered generator light plant and warehouse building was installed and another warehouse built in 1970.

BLM forwarded a copy of the BIA memorandum to appellant for comment. On March 5, 1984, appellant filed a response, contending that the Wainwright school reserve does not qualify for exclusion from any conveyance to the Native village corporation. Appellant argued that BIA's November 1983 memorandum must be stricken from the record where it was filed 82 days after the filing deadline set in 43 CFR 2655.3(a), and that, as such, BIA has failed to carry its burden of proof under 43 CFR 2655.3(d) to justify exclusion of the land. Appellant also argued that section 19(a) of ANCSA, 43 U.S.C. § 1618(a) (1982), revoked the Wainwright school reserve and "[n]o § 3(e) determination, therefore, need be made as no federal agency retains an interest in the land." In the alternative, appellant contended that the question of whether a particular site is "actually used" as a Federal installation within the meaning of 43 U.S.C. § 1602(e) (1982), depends on not only historical use but "present necessity," i.e., "as of the time of the § 3(e) determination." The Wainwright school reserve does not qualify for exclusion from the conveyance to the Native village corporation under this standard, appellant argued, because BIA "no longer uses U.S.S. 2041 for any purpose." 1/ Appellant stated that, in the October 1974 Memorandum of Agreement, BIA "effectively" abandoned the school reserve, subsequently affirming this stance in various statements, and that NSBSD took over the educational programs of the school "shortly thereafter." Appellant noted that "[i]t is of no consequence that the termination of BIA educational services may have occurred after December 18, 1974." Finally, appellant contended that at the very least the area of the school reserve deemed to be the "smallest practicable tract" under 43 U.S.C. § 1602(e) (1982) should be reduced to reflect the fact that BIA had granted a use permit on June 17, 1971 (Permit No. 03-71-U-5), to the Wainwright Village Council for two fuel tanks and that "BIA only used the south half of the parcel for school purposes during the selection period." In addition, appellant stated that the "transfer and abandonment of educational programs is surely an action which took place during the selection period which reduced the area needed by the BIA."

In a March 7, 1985, memorandum to the Chief, Branch of ANCSA Adjudication, the Deputy State Director for Conveyance Management concluded that the Wainwright school reserve in its entirety was not available for selection by appellant under section 3(e) of ANCSA. The Deputy State Director stated that BLM had considered BIA's November 1983 memorandum because, although filed untimely, the regulations "do not require BLM to reject a

1/ Appellant has submitted two affidavits in support of its assertions regarding use of the facilities at the Wainwright school site. In an affidavit dated Jan. 27, 1984, Barry Bodfish, Sr., who worked as a maintenance man at the school from 1968 to 1974, reports that NSBSD "took over the buildings when the BIA left in the mid-1970's" and used them until new elementary high schools were built "at the south end of Wainwright." Since then, the site has been continuously used only for "teacher housing." In an affidavit dated Jan. 17, 1984, David A. Panik, who worked as a maintenance man at the school from 1960 to 1974, describes the location and use of the various buildings at the site. The buildings are depicted on a sketch map attached to his affidavit.

Federal agency's claim if [its] justification is not submitted within the time [period] specified in the regulations." The Deputy State Director stated that BLM did not consider any evidence of actions which occurred after December 18, 1974, i.e., the end of the village selection period, because "43 CFR 2655.2 makes it clear that BLM is to determine if the Federal agency (or a similar agency) used the lands as of December 18, 1971 and if the same type of use was continuous throughout the village selection period." The Deputy State Director also held that NSBSD use of the school reserve, even during the selection period, would not affect the decision to retain the land in Federal ownership under 43 CFR 2655.2(b)(3)(v), which provides for the retention of "lands used by a non-governmental entity or private person for a use that has a direct, necessary and substantial connection to the purpose of the holding agency." The Deputy State Director noted:

> The Memorandum of Agreement between the BIA and the NSBSD was a contractual agreement in which the NSBSD agreed to perform the same duties the BIA was previously responsible for. Even though the NSBSD took over the educational program on behalf of BIA, the BIA still continued to administer or oversee this program.

Finally, the Deputy State Director concluded that the area of the school reserve to be retained in Federal ownership should not be reduced, based on two aerial photographs of the site taken July 4, 1972, and July 31, 1974, which confirmed David A. Panik's location of the on-site improvements see note 1:

> The two BLM aerial photographs show there are a cluster of nine fuel tanks within the northeast corner of the school site. It is assumed the two tanks permitted to the village are within this cluster and that the two tanks were used by the village as of December 18, 1971. Under the criteria of the Sec. 3(e) regulations, this area containing the two village tanks would normally not qualify for retention by the Federal government. However, this area would be within the buffer area that is necessary for the other fuel tanks in case of fire or spillage. Therefore, this area will be retained in Federal ownership.
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> The two BLM aerial photographs show BIA's improvements occupy the majority of the site. The undeveloped area along the western and eastern boundaries of the site provides a reasonable buffer area for building maintenance and noise abatement. The undeveloped area north of the play deck area provides a reasonable amount of open space or play space for the school children.

In its March 1985 decision, BLM referred to this memorandum and concluded that the Wainwright school reserve was not public land within the meaning of section 3(e) of ANCSA, and, thus, rejected appellant's selection application to the extent of a conflict.

In its statement of reasons for appeal, appellant contends that the Board should either reverse BLM's decision that the Wainwright school reserve qualifies as a section 3(e) Federal installation or reduce the size of the

area to be retained in Federal ownership. Appellant reiterates the arguments made in its March 1984 response to BIA's November 1983 memorandum. 2/ Appellant contends again that BIA abandoned the school reserve during the selection period and that, in such circumstances, section 3(e) of ANCSA does not require BIA to retain control of the reserve. Appellant states that BIA's only function, after action under the Memorandum of Agreement was taken, was to provide funding and that NSBSD operated the school independently of BIA. Appellant also argues that NSBSD's use of the school reserve has no "direct, necessary and substantial connection" under 43 CFR 2655.2(b)(3)(v) to the purpose of BIA where NSBSD educates all of the school age children of Wainwright, not just Native children. Appellant also contends again that BIA's justification was untimely and should be "stricken from the record." The Office of the Regional Solicitor, on behalf of BLM, filed a response to appellant's statement of reasons.

The first issue which we must address is the effect of the untimely submission of BIA's November 1983 memorandum in response to the March 1983 BLM request for information needed in order to enable BLM to make a section 3(e) determination. BIA's memorandum was clearly filed untimely under 43 CFR 2655.3(a), which provides, at most, for 150 days for the submission of requested information. However, as the Regional Solicitor points out, we held in Federal Aviation Administration, 83 IBLA 382, 393 (1984), that, in the interest of an accurate section 3(e) determination, the Department could properly consider relevant evidence submitted after the regulatory deadline, but prior to a final decision, especially where there were "no sanctions * * * provided for failure to comply with the time limits except for the risk of an adverse determination." We adhere to that holding. In resolving the question of whether the Wainwright school reserve should be retained in Federal ownership, the Board will consider all of the evidence in the record. See 43 CFR 2655.3(d).

[1] The crucial issue in this case is whether the Wainwright school reserve is a tract of land "actually used in connection with the administration of [a] Federal installation," under section 3(e) of ANCSA. Appellant argues that the determination of actual use must be made "as of the time of the § 3(e) determination." The Regional Solicitor notes that appellant would require that the holding agency use the installation not only during

2/ However, appellant has apparently chosen not to pursue its earlier argument that BLM did not have to make a section 3(e) determination because section 19(a) of ANCSA, supra, revoked the school reserve effected by the May 4, 1907, Executive Order. Section 19(a) of ANCSA revoked reserves set aside by Executive Order "for Native use or for administration of Native affairs," including the Wainwright school reserve. However, regardless of the revocation, the land remained public land which was then also withdrawn and made available for selection by a Native village corporation by ANCSA. That withdrawal under 43 U.S.C. § 1610(a)(1) (1982) was, as previously noted, only applicable to "public lands" as defined in section 3(e) of ANCSA, with the exceptions enumerated therein. BLM was, thus, still required to make a section 3(e) determination before conveying the land to the Native village corporation.

the selection period but continue such use until the date of the section 3(e) determination in order to qualify for retention in Federal ownership under the statute. The Regional Solicitor states that there is no support for appellant's position in Departmental regulations or decisions of the Board.

In Ukpeagvik Inupiat Corp., 81 IBLA 222 (1984), we addressed the question of what is the relevant time period for determining whether a tract of land has been actually used in connection with a Federal installation and concluded that, under 43 CFR 2655.2(a), it is the selection period. In 43 CFR 2655.0-5(b), the selection period is defined as the "statutory or regulatory period within which the lands were available for Native selection under the Act." In the present case, the selection period ran from December 18, 1971, for "three years," i.e., until December 18, 1974. 43 U.S.C. § 1611(a) (1982). For purposes of determining actual use under the statute, it is simply irrelevant what use was made of the installation either before or after the selection period. Federal Aviation Administration, supra at 394.

In the present case, appellant essentially admits on appeal that BIA used the Wainwright school reserve throughout the selection period. In his affidavit, David A. Panik states that BIA left Wainwright at the end of December 1974 and that NSBSD then operated the school until several years prior to January 1984 when a new school was constructed. Moreover, in its November 1983 memorandum, BIA stated that it "operated the Wainwright School continuously during the selection period from December 18, 1971, through December 18, 1974." BIA reported that NSB "has administered the education programs of the BIA Wainwright School since July 5, 1975." The Regional Solicitor states that this was following the close of the school year, which was the logical time for a transfer of administrative responsibilities. Appellant has provided no evidence that BIA did not use the school site continuously during the selection period.

In a reply brief, appellant appears to concede that use under section 3(e) of ANCSA, must be that use made during the selection period under 43 CFR 2655.2(a). However, appellant argues that action taken by BIA during the selection period which indicates that the holding agency no longer needs the land must be taken into account under 43 CFR 2655.3(b)(7) and 43 CFR 2655.2(b)(1), and that BLM should only retain that land for which the holding agency has demonstrated a continuing need throughout the selection period. Appellant has essentially modified its argument regarding "present necessity" as of the time of the section 3(e) determination, i.e., requiring that the land be then needed by the holding agency, instead arguing that the holding agency must have a "present necessity" for the land throughout the selection period. Appellant states that the Board has never had a case involving action taken by a holding agency during the selection period indicating an intention to abandon a section 3(e) Federal installation, and refers to the October 1974 Memorandum of Agreement between NSBSD and BIA as clearly indicating that BIA would no longer need the Wainwright school reserve.

The Regional Solicitor argues that it is immaterial to a section 3(e) determination that the holding agency has expressed an intention "during the

selection period," to transfer responsibility for the installation after the selection period. We agree. The determinative factor in a section 3(e) determination is whether a Federal agency "actually used" the land during the selection period in connection with administration of a Federal installation. 43 U.S.C. § 1602(e) (1982). The statute does not require that the agency demonstrate a need for the land throughout the selection period. Similarly, 43 CFR 2655.2(a), which sets forth the "three criteria which [BLM] will use in order to make a 3(e) determination" 3/ (45 FR 70204 (Oct. 22, 1980)), does not require the holding agency to demonstrate a need for the land throughout the selection period. The question of agency need is simply not a determinative factor in whether to retain land in Federal ownership under section 3(e) of ANCSA. It arises only in the context of deciding what size the area retained should be once qualifying use during the selection period has been established. Thus, 43 CFR 2655.3(b)(7) provides that in the course of its section 3(e) determination BLM should consider "whether any action has taken place between December 18, 1971, and the end of the appropriate selection period that would reduce the area needed." This is required in part because, under 43 CFR 2655.2(b)(1), the area retained must be "no larger than reasonably necessary to support the agency's use." That use is not the agency's prospective or even planned use but that actual use which was demonstrated during the selection period. The size of the retained tract must be commensurate with that established use. Indeed, the language in 43 CFR 2655.2(b)(1) was intended to clarify the statutory term "smallest practicable tract" (45 FR 70205 (Oct. 22, 1980)), which is that tract actually used during the selection period.

Appellant is correct in its assertion that the Board has never had a case where a Federal agency took definite steps during the selection period to transfer responsibility for administration of a section 3(e) Federal installation. We have held as a general matter that "prospective or planned future use [of a Federal installation, including transfer of a BIA-operated school to the State of Alaska] is immaterial and irrelevant to [a section 3(e)] determination." Nunakauiak Yupik Corp., 87 IBLA 313, 315 (1985). We conclude that this holding is equally applicable where the Federal agency entered into an agreement during the selection period to transfer operation of a section 3(e) Federal installation, or even to transfer the land. As noted above, the applicable statute and regulations are only concerned with actual use by the Federal agency within the selection period. See Federal Aviation Administration, supra. If actual use after the selection period is immaterial to a section 3(e) determination, likewise a decision or even a binding agreement during the selection period to discontinue that use, which has no effect on actual use, is immaterial. Obviously, this holding could have the effect of retaining land in Federal ownership, the use of which is immediately transferred from the Federal agency after the selection period. However, that was the choice made by the Department in deciding to limit the

3/ These three criteria are: "(1) Nature and time of use, (2) area to be retained by the Federal agency, and (3) interest to be retained by the Federal agency." 45 FR 70204 (Oct. 22, 1980).

statutory requirement of actual use to that use made during the selection period. 4/ See Ukpeagvik Inupiat Corp., supra at 227.

We turn, therefore, to the question of what is the "smallest practicable tract" of the Wainwright school reserve which should be retained in Federal ownership. As noted above, the size of the tract to be retained will be based on what use BIA was making of the property during the selection period, not on what use was planned or agreed upon after the selection period.

Appellant refers first to the fact that BIA issued a 12-month revocable use permit for two fuel tanks to the Wainwright Village Council on June 17, 1971, as indicating that the entire parcel was no longer needed for school purposes. The Regional Solicitor argues that the fuel tanks were among a cluster of 9 or 10 tanks which were used by BIA prior to issuance of the permit and after its expiration on June 17, 1972, and that it would be impracticable to segregate out the area occupied by the two tanks. Appellant does not dispute the fact that the two fuel tanks covered by the use permit were part of a cluster of fuel tanks, which were used during the selection period. Indeed, the tanks are depicted on the sketch map of the school site attached to the January 17, 1984, affidavit of David A. Panik, in which he states: "There are large fuel tanks on the property, which are still used today." In his March 1985 memorandum, the Deputy State Director concluded that, regardless of whether the two fuel tanks were used by the village council, they were "within the buffer area that is necessary for the other fuel tanks in case of fire or spillage." The retention of buffer areas is expressly permitted under 43 CFR 2655.2(b)(3), which provides that: "Tracts may include: * * * (ii) Buffer zone surrounding improved lands as is reasonably necessary for purposes such as safety measures, maintenance, security, erosion control, noise protection and drainage." See Ukpeagvik Inupiat Corp., supra at 228. Appellant does not present any evidence that the area occupied by the two fuel tanks does not constitute an adequate buffer zone for the other tanks. Accordingly, we conclude that this area is properly retained in Federal ownership.

Appellant also contends that BIA used only the south half of the school site during the selection period, referring to the Panik affidavit. That affidavit, however, indicates that, during the selection period, the north half of the school site contained three buildings (generator house, warehouse, and ice house), which, although condemned, were still used. In his March 1985 memorandum, the Deputy State Director concluded that the undeveloped areas on the eastern and western boundaries of the site were needed as a buffer area for building maintenance and noise abatement and that

4/ This holding has the salutary effect of allowing a Federal agency, which actually used a tract of land during the selection period and thus established that the land would be excepted from withdrawal and selection for the benefit of a Native village corporation, to make arrangements to dispose of responsibility for the land during that time period and to then carry through with those arrangements. To hold otherwise would jeopardize Federal land use planning and subsequent use of the land, which are inherently on-going activities, with no express sanction in ANCSA, or Departmental regulations.

the undeveloped area north of the play deck area provides open play space for the school children. There is no indication that the play deck was in existence during the selection period. Nevertheless, we cannot conclude that the area in the northwestern corner of the school site was not an appropriate area for children's play activities during the course of a school day. 5/ We find such an area was "reasonably necessary" to the educational purposes of a school. See 43 CFR 2655.2(b)(1). Appellant has provided no evidence disputing the size of the play area or the size of other interspersed undeveloped areas used as a general buffer zone. That buffer zone was properly included in the school reserve under 43 CFR 2655.2(b)(3)(ii).

Accordingly, we conclude that BLM properly rejected Native village selection application F-14954-A to the extent of its inclusion of the 1.80-acre Wainwright school reserve, F-80861, which will be retained in Federal ownership pursuant to section 3(e) of ANCSA.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

Wm. Philip Horton
Chief Administrative Judge

We concur:

Kathryn A. Lynn
Administrative Judge
Alternate Member

Bruce R. Harris
Administrative Judge

5/ The relative size of that area is better depicted on the July 31, 1974, BLM aerial photograph (scale 1" = 213'), in relation to the new school building and the other buildings which were admittedly in existence during the selection period, than on the Panik handdrawn sketch map, which is not drawn to scale.